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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 921

FUNKS GROVE GRAIN COMPANY,

Petitioner,

vs.

THE ALTON RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

U. S. Law Printing Co., 54 W. Illinois St., Chicago

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IN THE

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OCTOBER TERM, A. D. 1940.

NO.

FUNKS GROVE GRAIN COMPANY,
Petitioner,

v.

THE ALTON RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May It Please the Court:

The petition of Funks Grove Grain Company respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

I.

Proceedings in Court.

On the 8th day of May, 1940 a judgment was entered by the United States District Court in and for the Northern District of Illinois, Eastern Division, in favor of the petitioner against the respondent for the sum of $2,150.63, as damages and costs of suit, wherein the Court taxed the Master's fees at the sum of $100.42 and attorneys' fees at the sum of $215.06 (Tr. 258, 259).

This judgment was one of seven judgments entered in favor of several claimants against the respondent (Tr. 226, 258), the other six thereof now standing on motions for a new trial to abide final disposition of petitioner's judgment.

An appeal was taken by respondent to the United States Circuit Court of Appeals in and for the Seventh Circuit (Tr. 260-263) which reversed the judgment on December 14, 1940 (Tr. 281-292). A petition for rehearing was filed December 28, 1940 (within the time allowed by the rules of court) by the petitioner, which petition was denied February 21, 1941 (Tr. 292).

II.

The Facts Involved Herein.

The claim of the claimant herein is for reparation on account of excessive charges exacted from it contrary to law in the operation of the railroad by the Court's Re-

ceivers (Tr. 99) and are unpaid administrative expenses.

The main suit—*Texas Company* v. *C. & A. R. Co.*, was brought to foreclose a mortgage on the railroad property and its assets (Tr. 93, 94). The Court on or about August 30, 1922 appointed William W. Wheelock and William G. Bierd, Receivers, to operate the railroad pending the foreclosure proceeding. Said Receivers accepted the appointment and operated the railroad up to the time of their discharge on July 18, 1931 (Tr. 178-181).

This claimant being one of seven (Tr. 226), was consignee of bituminous coal transported by the Receivers in intrastate commerce, and paid and bore the transportation charges made against it by the Receivers (Tr. 115-116).

Said claimant jointly with others seasonably filed their complaint with said Illinois Commerce Commission on August 30, 1924, alleging that the rates charged and collected by the Receivers were excessive, unjust, unreasonable and unjustly discriminatory, in violation of the Public Utilities Act, and asked the Illinois Commerce Commission to fix and determine what would be the just, reasonable and non-discriminatory rates for the shipments and award reparation, as by the Public Utilities Act provided (Tr. 98-101). An answer was filed by the Receivers to said complaint (Tr. 101) and after full hearing the Commission by its finding and order dated May 26, 1931 (Tr. 98-117) found the rates which had been exacted from the complainants were excessive and also found what would have been the just, reasonable and non-discriminatory rates which should have been charged for such shipments (Tr. 115), also found that reparation should be awarded claimant upon said shipments, but

directed that the complainants and the defendants adjust the amount thereof by compromise, private negotiation and settlement (Tr. 116).

The case in the District Court proceeded to a decree of foreclosure and sale, which was entered on the 6th day of July, 1929. This decree directed that the purchaser or its assignee as a part of the purchase price pay, satisfy and discharge to the extent that the same shall not have been paid out of moneys in the possession of the Receivers all unpaid indebtedness and liabilities of the Receivers incurred in the management or operation of the railroad properties in their possession (Tr. 93-94).

The Alton Railroad Company became the assignee of the purchaser at said sale and assumed the obligation to pay all unpaid liabilities of the Receivers (Tr. 53).

The Court in its order discharging the Receivers entered November 9, 1931, directed that all claims should be filed with the Court on or before February 4, 1932. In accordance with this order claimant, not having been able to adjust them, filed its claim on or about February 2, 1932 (Tr. 178-181).

A motion was made by The Alton Railroad Company to strike the claim for the reason that the order of May 26, 1931 was incomplete and the Special Master to whom the subject matter was referred by his report recommended that the motion be granted. This report, however, was thereafter vacated and set aside by the Court (Tr. 37).

Thereafter on October 6, 1937 claimant with others filed with the Commission a petition called herein "First

Supplemental Petition" (Tr. 181-184), wherein after stating the facts, asked the Commission to complete by supplemental order finding the precise amount of the reparation. This the Commission did after full hearing by its order of March 17, 1939 (Tr. 118), and after the entry of the order of March 17, 1939 claimant filed an amendment to its original claim in the District Court, alleging specifically the amount of the damages, interest and costs to which it was entitled, making said orders of May 26, 1931 and March 17, 1939 a part thereof (Tr. 38-40).

The District Court referred the claim to Honorable Charles A. McDonald, Master in Chancery, who heard the evidence and made his reports (Tr. 217 and 248). On the hearing before the Master the petitioner introduced into evidence the final decisions and orders of the Illinois Commerce Commission, Exhibit "1" (Tr. 98) and Exhibit "2" (Tr. 119), also Exhibit "3" (Tr. 130), a letter of the Secretary of the Commission relative to the granting of a rehearing, Exhibit "4" (Tr. 131), Exhibit "5" (Tr. 150), former orders entered by the Commission on the hearing of the case, also Exhibit "6" (Tr. 178), being the order entered by the District Court discharging the Receivers and providing for the assumption of payment of unpaid claims incurred by the Receivers, and other facts necessary to make a *prima facie* case were stipulated. The respondent introduced into evidence Exhibit "A" (Tr. 181), the First Supplemental Petition, Exhibit "B" (Tr. 185), the petition for rehearing and order denying First Supplemental Petition, Exhibit "D" (Tr. 194), the order as to the Schedule of Reasonable Maximum Rates of Charges, and Exhibit "E" (Tr. 215), a map showing the points of origin and destination of the shipments involved. Respondent also produced Witness

Behrle (Tr. 80 *et seq.*), who testified as to Exhibit "E" and on cross-examination admitted that Exhibit "D" did not purport to cover any specific shipments.

The Master held, among other things, that this Exhibit "D" being introduced into evidence before the Commission, which gave to it *prima facie* effect on proof of the reasonableness of the charges and all the evidence, including that which would rebut said effect not being introduced before him, that the claims were properly proven and recommended that judgment be entered (Tr. 250).

The Court adopted the findings of the Master, overruled the objections of petitioner and respondent, and entered judgment, as hereinbefore set forth (Tr. 257-259).

On appeal the Circuit Court of Appeals reversed the District Court assigning as the principal reason that the *obiter dictum* found in a subsequent case in the State Supreme Court overruled a prior decision of that court to the contrary.

The District Court held that a schedule of reasonable maximum rates adopted by the Commission was by reason of the statute authorizing it only *prima facie* evidence as to the reasonableness of the rates in question. The Circuit Court of Appeals reversed the District Court holding that the said schedule of reasonable maximum rates was a legislative act and forbid the awarding of reparation on rates within the limits of the schedule.

B.

Basis of Jurisdiction Herein.

Jurisdiction herein conferred by Section 240, as amended, of the Judicial Code, Title 28, Section 347 (a).

C.

The Questions Presented.

1. The United States Circuit Court of Appeals herein erred in attributing to an Act of the Illinois Commerce Commission (Exhibit "D") a meaning and effect forbidden by the statute authorizing its issuance.

2. The act authorizing the order (Exhibit "D" herein) did not confer upon the Illinois Commerce Commission any jurisdiction to pass a legislative act.

3. The uniform practice and procedure which has obtained before the Illinois Commerce Commission for many years past is that the effect of a schedule of reasonable maximum rates, when introduced into evidence before the Commission, is only *prima facie* proof, placing the burden upon the complainants of proving that such rates are unreasonable. This decision destroys a common law and statutory right heretofore inherent in the residents of the State of Illinois.

4. The decision of the United States Circuit Court of Appeals herein is contrary to the decisions of said court in the Fifth Circuit, wherein similar orders were held to be ineffective as legislative acts because they did not establish specific rates for the transportation involved, and that rates adopted under similar circumstances were carrier-made and always open to inquiry as to their reasonableness.

5. The United States Circuit Court of Appeals in its decision erred in construing the holdings in *C. B. & Q. R. R. Co.* v. *Jones*,[1] *C. B. & Q R. Co.* v. *The People*,[2] *Public*

[1] 149 Ill. 361.
[2] 77 Ill. 443.

Utilities Com. v. *A. T. & S. F. Ry. Co.*,[3] and *Arizona Grocery Company* v. *A. T. & S. F. Ry Company*,[4] and in the conclusions drawn therefrom.

6. The District Court correctly interpreted the law herein in holding that the rates complained of being carrier-made, the Commission had power to grant reparation due to their being unjust, excessive and discriminatory.

D.

Reasons Relied On for Allowance of Writ.

1. The decision of the United States Circuit Court of Appeals herein conflicts with the decisions of the State Supreme Court of Illinois by in effect overruling the state decisions, basing its conclusion upon a mere *obiter dictum*, thereby upsetting the practice and procedure of collecting reparation from carriers, which has obtained in Illinois since the organization of the Illinois Commerce Commission.

2. The decision of the United States Circuit Court of Appeals herein is in conflict with the decision of the United States Circuit Court of Appeals in the Fifth Circuit involving similar principles.

3. The decision of the said Circuit Court of Appeals herein decided an important question of local law contrary to applicable local decisions.

The Supreme Court of the State of Illinois has interpreted Section 8[5] of the act to prevent extortion, etc., to allow the Illinois Commerce Commission to prescribe a schedule of reasonable maximum rates, which would be

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[3] 278 Ill. 58.
[4] 284 U. S. 370.
[5] Chap. 114, I. R. S. 1939, S. B. A. Ed., par. 125, p. 2591.

a rule of evidence only and not a legislative act. While said Circuit Court of Appeals' decision has held that such a schedule of reasonable maximum rates is a legislative act and not a rule of evidence.

4. The decision of the said Circuit Court of Appeals herein has departed from the accepted and usual course of judicial proceedings.

The accepted and usual course of judicial proceedings in cases of like character has been to consider orders such as Exhibit "D" merely a rule of evidence, placing the burden of proof upon the protestants to show that the rates complained of were excessive, unreasonable and unlawful, which duty was invested in the Illinois Commerce Commission by Section 32[6] of the State Public Utilities Act. The Circuit Court of Appeals by its decision has departed from this rule and held that the order, Exhibit "D" herein, was legislative and conclusive in its effect.

5. The decision of the said Circuit Court of Appeals herein overrules the contemporaneous construction placed upon an Illinois statute by the Illinois Commerce Commission and Illinois courts, which would prohibit the functioning of the Commission in allowing reparation on account of unreasonable, excessive and discriminatory freight rates to Illinois shippers, thereby presenting an important question of public interest.

6. The decision of the said Circuit Court of Appeals herein attributes to a schedule of reasonable maximum

[6] Chap. 111⅔, I. R. S. 1939, S. B. A. Ed., par. 32—111⅔, Sec. 32.

rates (Exhibit "D" herein) a legislative effect when the same is only a rule of evidence.

7. The decision of the said Circuit Court of Appeals herein in effect, deprives the citizens of the State of Illinois of their common law and constitutional rights.

8. The decision of the said Circuit Court of Appeals herein is contrary to the decisions of the State Supreme Court, which specifically hold that if the passage of an order authorizing a schedule of reasonable maximum rates is considered legislative in character, it would be unconstitutional.

9. The decision of the said Circuit Court of Appeals herein erroneously followed decisions in other states wherein state statutes imposed upon Commissions the specific duty of fixing rates as a legislative act, while no such or similar statute is found in Illinois.

In Illinois the Commission by Section 8 [7] of the Extortion Act is empowered to fix a reasonable maximum rate as a rule of evidence only. Section 32 [8] of the Public Utilities Act prohibits the collection of unreasonable, excessive and discriminatory rates, and Sections 41 [9] and 72 [10] thereof invest the Commission with the uncontrolled power and duty of determining the reasonable, non-excessive and non-discriminatory rates and of allowing reparation for excessive and non-discriminatory rates exacted by the carriers.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

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[7] Chap. 114, I. R. S., S. B. A. Ed., par. 125, p. 2591.
[8] Chap. 111⅔, I. R. S., S. B. A. Ed., par. 32, 111⅔, Sec. 32.
[9] Chap. 111⅔, I. R. S., S. B. A. Ed., par. 41, 111⅔, Sec. 41.
[10] Chap. 111⅔, I. R. S., S. B. A. 7d., par. 76, 111⅔, Sec. 72.

this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled *The Texas Company et al., complainants* v. *The Chicago & Alton Railroad Company, et al., defendants. Funks Grove Grain Company, claimant-appellee,* v. *The Alton Railroad Company, defendant-appellant,* No. 7358, to the end that the said case may be reviewed and determined by this Honorable Court and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

Funks Grove Grain Company,
Petitioner,

By Thomas B. Lantry
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